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IN THE

Supreme Court of the United States

October Term 1965

No. ~~[illegible]~~ 67

HELEN MAXINE LEVI TRAVIS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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IN THE

Supreme Court of the United States

October Term 1965
No. .....

HELEN MAXINE LEVI TRAVIS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner prays that a writ of certiorari issued to review the judgment of the United States Court of Appeals for the Ninth Circuit, rendered and entered in the above-entitled cause on November 19, 1965.

Opinions Below.

The memorandum opinion of the District Court [R. 117][1] is not reported; it appears herein in Appendix A. The Opinion of the Court of Appeals [R. 140] is not yet reported; it appears herein in Appendix B.

Jurisdiction.

The Opinion and Judgment of the Court of Appeals were entered November 19, 1965. [R. 139-143.] A timely petition for rehearing was filed December 17, 1965, and

[1]Signifying Transcript of Record, page 117.

was denied on January 4, 1966. [R. 144.] The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

Statutory Provisions Involved.

The statutory provision involved herein is 8 U.S.C. Sec. 1185 (Sec. 215, Imm. and Nat. Act of 1952, 66 Stat. 190) (hereinafter referred to as Section 1185), which appears herein in Appendix C. The regulation involved herein is State Department Regulation No. 108.-456, 26 Fed. Reg. 482, 22 C.F.R. Sec. 53.3 (hereinafter referred to as the "Excluding Cuba" regulation), which appears herein in Appendix D. (For convenience, 22 C.F.R. 53.1, 53.2 and 53.3 as existing prior to the "Excluding Cuba" regulation also appear herein in Appendix E.) Public Notice 179 (26 Fed. Reg. 492) and Press Release No. 24 (44 Dept. St. Bull. 178), issued by the State Department concurrently with the "Excluding Cuba" regulation, appear herein as Appendices F and G, respectively.

Presidential Proclamation No. 3004 (January 17, 1953, 67 Stat. C31) issued under Section 1185 and to give that statute effect, appears herein in Appendix H. Presidential Proclamation No. 2914 (December 16, 1950, 64 Stat. A454), referred to in Proclamation No. 3004, appears herein as Appendix I.

Questions Presented.

Involved at bar is the important question of statutory and Constitutional law—*expressly reserved* by this Court in the *civil* case of *Zemel v. Rusk*, May 3, 1965, 381 U.S. 1, 12, 18-20—whether the 1961 administrative ban on travel to Cuba can be given *criminal sanction*.

More completely stated, the question is whether the 1961 "Excluding Cuba" regulation (Regulation No. 108.456, 26 Fed. Reg. 482, 22 C.F.R. Sec. 53.3), eliminating Cuba from the area for which passports are not required and requiring a special validation, allowable only in total discretion, for travel thereto, can support a *criminal* prosecution under 8 U.S.C. Sec. 1185 for a claimed violation thereunder, including under that fundamental question the following subordinate issues:

1. Whether Section 1185 (as distinct from 22 U.S.C. Sec. 211a, the Passport Act of July 3, 1926, 44 Stat. 887, involved in *Zemel v. Rusk*) grants statutory authority, backed by *criminal* sanction, for an area restriction upon travel such as the "Excluding Cuba" purported regulation;
2. Whether such regulation can be enforced with *criminal* sanctions under Section 1185 although the said regulation was *expressly* not promulgated under authority of Section 1185 but only under authority of 22 U.S.C. Sec. 211a, which bears *no criminal sanction;*
3. Whether in light of point (2) and of issues involved in point (1) hereinafter detailed under Point I below, Section 1185 and the "Excluding Cuba" regulation if construed to impose such criminal sanctions violate due process of law for vagueness, contradiction and misleading terms in the communication of a criminal command;
4. Whether Section 1185 if construed to authorize issuance thereunder of criminal area travel prohibitions unconstitutionally delegates legislative power without adequate or any standards; and

5. Whether Section 1185 and the "Excluding Cuba" regulation, if construed to authorize a criminal restraint against travel to Cuba as below, including particularly restraint whereunder special validation for such travel is allowable only under unconfined, absolute discretion, deprives petitioner of personal liberty and of freedom of speech, thought and association contrary to the First and Fifth Amendments.

Also involved is whether Section 1185 and the "Excluding Cuba" regulation can properly be applied to a departure not directly to Cuba but only to Mexico, with application to Cuba for permission to enter being made only *after*, not prior to, United States departure.

Finally, there is tendered the continuing validity and effectiveness of Presidential Proclamations Nos. 3004 and 2914.

Statement of the Case.

Petitioner was convicted below on two counts for claimedly violating Section 1185, and the "Excluding Cuba" regulation under it, under an indictment charging that upon two occasions, on January 22, 1962 and on August 18, 1962, petitioner "did . . . depart from the United States without bearing a valid passport, for the Republic of Cuba, via Mexico . . ." [R. 2-4.]

Section 1185 provides in core that after a presidential declaration of emergency (proclaimed in Presidential Proclamation No. 3004)[2] it shall be a crime for any person "to depart from or enter, or attempt to depart

[2]Proclamation No. 3004, 67 Stat. C31, was proclaimed January 17, 1953. It is disputed under Point VII hereunder that it was still valid and effective at the time of petitioner's acts of travel below (1962).

from or enter, the United States unless he bears a valid passport."

The "Excluding Cuba" regulation (Regulation No. 108.456, January 16, 1961, 26 Fed. Reg. 482, 22 C.F.R. Sec. 53.3) amends former 22 C.F.R. Sec. 53.3 to eliminate Cuba from the Western hemisphere area to which travel may be undertaken without a passport. Concurrently, on the same day, the Secretary of State also issued Public Notice 179 (26 Fed. Reg. 492) providing no passport would thereafter be valid for travel to Cuba "unless specifically endorsed for such travel," and Press Release No. 24 (44 Dept. St. Bull. 178) advising that "exceptions" allowing issuance of passports valid for Cuba would be made by the Secretary—but only where regarded by him "as being in the best interests of the United States . . ."

None of these "Excluding Cuba" public acts and documents—Regulation No. 108.456, Public Notice 179 or Press Release No. 24—cited or referred to Section 1185 in any way as authorizing authority. *To the contrary, both* Regulation No. 108.456 and Public Notice 179 *expressly* cited the *civil* Passport Act of 1926 (Act of July 3, 1926, 44 Stat. 887, 22 U.S.C. Sec. 211a), a statute imposing *no criminal penalty* for violation of regulations issued under its authority, as their *sole* promulgative authority.

Thus the promulgative paragraph of Regulation No. 108.456, excerpted for clarity, recites expressly the authority of the Act of July 3, 1926 (22 U.S.C. Sec. 211a), stating:

> "Pursuant to the authority vested in me by . . . the Act [of] July 3, 1926 . . . I hereby amend paragraph (b) [of 22 C. F. R. 53.3] as follows . . ." (26 Fed. Reg. 482.)

In similar manner, Public Notice 179 states simply:

> "Therefore pursuant to the authority vested in me by [22 C. F. R. 51.75 and 51.77] issued . . . under authority of . . . the Act [of] July 3, 1926 . . . all United States passports are hereby declared . . ."

There are no disputed facts at bar. Petitioner was tried by the court with a jury waived, upon an agreed "Stipulation of Facts." [R. 63-66.]

The Stipulation of Facts recites that petitioner at all material times was and is a citizen [Stipulation of Facts, R. 63-66, par. 2]; that at all material times she knew the provisions of Section 1185 and of 22 C.F.R. Secs. 53.2 and 53.3 (par. 11); that at all material times she did not possess a valid United States passport specifically endorsed for travel to Cuba (par. 11); and that on January 22, 1962 and on August 18, 1962 petitioner "intentionally left and departed from the United States" by plane on the first date and by automobile on the second date. (Pars. 4 and 7.)

The Stipulation recites that defendant did not in either instance depart directly for Cuba but rather for Mexico, intending in each instance to seek permission to travel to Cuba only after her arrival in Mexico.

In each instance defendant entered Mexico upon a tourist permit issued by that country's government, and at the time of departing "intended to seek permission from representatives of the Republic of Cuba in Mexico, D. F., to visit Cuba." At the time of each departure from the United States she "did not have Cuba's per-

mission to enter Cuba" and she obtained that permission only after arrival in Mexico. (Pars. 4 and 7.) On the first occasion that permission was obtained four days after arrival in Mexico City, and on the second, twelve days after such arrival. (Pars. 4 and 7.) After the requisite permission had been obtained for entry into Cuba, petitioner traveled from Mexico City to Cuba by plane. (Pars. 5 and 9.)

After her arrival in Cuba on each of her said journeys thereto petitioner travelled in and about Cuba observing "the living and working conditions of the people and the effectuation and implementation of various government programs relating to housing, education, agriculture, industrialization and public health" and in the course of such travels took a number of pictures of which Exhibits 1A to 1M are representative. (Par. 12.) Upon her return to the United States and to her home in Los Angeles, California, petitioner appeared before "various groups and gatherings of her fellow citizens" and reported to them her observations upon her travels in Cuba and showed her photographs, Exhibits 1A to 1M. In addition petitioner wrote descriptions of her trips and her observances in Cuba which she disseminated by mail to friends and acquaintances and the copy of her letter dated February 28, 1962, Exhibit 2, is representative of such materials. (Par. 13.) The Stipulation of Facts and Exhibits 1A to 1M and 2 were duly admitted in evidence. [R. 67.]

By a written motion to dismiss the indictment [R. 6] and by an oral motion for judgment of acquittal [R. 67], each supported on leave by written briefs [R. 8, 68], petitioner challenged in the trial court the statute and the regulations, on their face and as applied, upon grounds substantially as expressed herein in the statement of Questions Presented above. Both said motions were denied. [R. 55-61; R. 117-124.] Petitioner was adjudged guilty on both counts of the indictment and was sentenced on each count to a fine of $500 and to six months imprisonment, suspended on probation. [R. 125.]

On Appeal the Court of Appeals affirmed. [R. 139-143.] A timely petition for rehearing was filed December 17, 1965 [R. 144], and was denied January 4, 1966. [R. 144.][3]

[3]A parallel prosecution of four defendants under Section 1185 for conspiracy and for travel to Cuba in 1963 without specially validated passports is presently pending in the United States District Court for the Eastern District of New York, *United States v. Lee Levi Laub, et al.*, No. 64 CR 137. Constitutional and statutory challenges to the prosecution there have not yet been determined.

REASONS FOR GRANTING THE WRIT.

Introduction.

Tendered in the case at bar, as developed in detail hereafter, are issues of statutory and Constitutional law and of public policy of far reaching national importance affecting the question—expressly reserved by this Court in *Zemel v. Rusk,* 381 U.S. 1—whether the Department of State by administrative ban can *criminally prohibit* travel by American citizens to designated world areas—in this case, travel to Cuba.

In *Kent v. Dulles,* 357 U.S. 116, this Court distinguished (pp. 120-123) between the *two* separable functions of passports—the first as a *civil* diplomatic act of granting or withholding diplomatic requests for safe passage, and the second as an instrument of *criminal* exit-control. *Zemel v. Rusk* dealt with the *civil* right to a passport for Cuban travel and held as to that matter —the *civil* withholding of request for safe-passage—22 U.S.C. Sec. 211a (the Passport Act of July 3, 1926) granted the Secretary authority to impose area travel restrictions and thereunder to refuse to issue Cuban travel passports. However, this Court there *expressly* reserved the question "whether [a person] can be criminally prosecuted under . . . 8 U.S.C. Sec. 1185(b) . . . for travel in violation of an area restriction," declaring that resolution of that criminal exit-control question "must await a concrete fact situation." (381 U.S. at pp. 18 and 20.)

The instant case presents that reserved question and poses that "concrete fact situation."

Involved at bar, first, is the serious question of statutory construction and policy whether Section 1185 au-

thorizes criminal punishment for travel in disregard of administrative area restrictions. The court below, implicitly upon the authority of *Zemel v. Rusk*, has held Section 1185 authorizes and provides such criminal sanction for violations of area restrictions, although the legislative history of the statute, and the consistent administrative construction of it and of its two predecessor statutes, demonstrate the statute was not intended to, and has uniformly been conceived and construed not to, convey such authority and to be inapplicable and irrelevant to area travel restrictions. *Zemel v. Rusk*, as observed above, involved only the *civil* base for area restrictions and expressly reserved the criminal base question posed here.

Also involved at bar is a grave conflict with due process fundamentals under the void-for-vagueness doctrine. The legislative and administrative history of Section 1185 and its predecessors not merely discloses that area restrictions have always been cast in civil terms and context only and never predicated upon Section 1185 or its predecessors, but discloses further that on two explicit occasions (and many more implicit ones) the Department of State has publicly and officially announced that area restrictions do not "forbid" affected travel and do not make such travel punishable criminally. area restriction (the "Excluding Cuba" regulation) is Added to this is the circumstance that the instant *expressly* promulgated *not* under Section 1185 but under a *civil statute* (22 U.S.C. Sec. 211a) bearing no provision for criminal punishment for violation of regulations issued under it. To enforce the instant area restriction as criminally punishable under Section 1185 in the case at bar, therefore, does violence to the consist-

ent due process decisions of this Court prohibiting contradictory, misleading or ambiguous terms in the communication of a criminal command. (*Raley v. Ohio*, 360 U.S. 423, 438; *Cox v. Louisiana*, 379 U.S. 559, 571; *Johnson v. United States*, 318 U.S. 189, 197; *United States v. Cardiff*, 344 U.S. 174, 176; *Jones v. United States*, 362 U.S. 257, 262-263; *Scull v. Virginia*, 359 U.S. 344, 353; *Quinn v. United States*, 349 U.S. 155, 166.)

The liberty put at stake at bar—freedom to travel—is a liberty "basic in our scheme of values" and one "closely related to the rights of freedom of speech and association." (*Kent v. Dulles*, 357 U.S. 116, 126; *Aptheker v. Secretary of State*, 378 U.S. 500, 517.) A decision, as below, subjecting such liberty to *criminal* administrative area prohibitions and restrictions poses deep-cutting Constitutional questions under the due process clause and under the First Amendment. Particularly so with the instant regulation and its feature of arbitrary, censorial licensing power in the provision vesting in the Department power to permit special license for travel to Cuba to "persons whose travel may be regarded as being in the best interests of the United States." (*Cox v. Louisiana*, 379 U.S. 536, 555-557; *Thornhill v. Alabama*, 310 U.S. 88, 97; *Kunz v. New York*, 340 U.S. 290, 294; *Saia v. New York*, 334 U.S. 558, 560-561; *Niemotko v. Maryland*, 340 U.S. 268, 271-272; *Cantwell v. Connecticut*, 310 U.S. 296, 305-307; *Largent v. Texas*, 318 U.S. 418, 422.)

Also posed in the instant case are the questions of unconstitutional delegation of legislative powers under Section 1185 and the question of the continuing effectiveness and validity of the proclamations of emergency required to bring the statute into operation.

The decision of the Court below, resolving all of the above questions in favor of state power, is expressed in but a three-page *per curiam* opinion. The opinion does not discuss directly or in any detail the statutory, Constitutional and policy questions raised but implicitly dismisses them all upon authority only of *Zemel v. Rusk* —although, as stated above, *Zemel v. Rusk* dealt only with the *civil* side of area restrictions and *expressly* reserved decision as to the *criminal-sanction* questions arising here.[4] It is respectfully submitted that in resolving all of the statutory, Constitutional and policy questions tendered at bar in favor of state power and in upholding criminal punishment for a violation of the Cuban area travel restriction, the Court below has decided important Federal questions which have not been, but should be, settled by this Court and has determined like questions in a manner in conflict with applicable decisions of this Court, all as developed in detail below, and certiorari, therefore, should be allowed.

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[4]The opinion below also cited *United States v. Healy*, 376 U.S. 75, 82, N. 7; *Worthy v. Herter* (C. A. D. C., 1959) 270 F. 2d 905, 912; *Porter v. Herter* (C. A. D. C., 1960) 278 F. 2d 280, 282 and *Worthy v. United States* (C. A. 5, 1964) 328 F. 2d 386. The footnote cited in *United States v. Healy* is but a passing *dicta* statement without consideration of the questions of Constitutional and statutory power and of policy expressly reserved in the subsequent decision in *Zemel v. Rusk*. *Worthy v. Herter* and *Porter v. Herter* are *civil* power cases only, and hence like *Zemel v. Rusk* are nondecisive here. *Worthy v. United States* is the only criminal area-restriction case among the cited decisions and it held *in favor of the defendant*, ruling Section 1185 unconstitutional in attempting to prohibit *entry* to the United States by a citizen after travel to Cuba without a special passport.

I.

Congress Did Not by Section 1185 Authorize Issuance of Criminal-Sanction Area Travel Bans.

The legislative history of Section 1185 and of its two exact border-control predecessor statutes (Act of May 22, 1918 and Act of June 21, 1941) and the record of area restrictions and of Executive acts and declarations relating thereto undertaken both before and since enactment of Section 1185, make plain that Section 1185 was not intended to, and by construction has uniformly been recognized not to, authorize issuance under it of criminal-sanction area travel bans.

(1) The legislative history of Section 1185 is the legislative history of its two *exact* predecessor statutes,[5] the Act of May 22, 1918, 40 Stat. 559, and the Act of June 21, 1941, 55 Stat. 252. That history demonstrates the legislative purpose was to impose *border control* only, not to institute or authorize area or geographical travel restraints. There is nothing in the terms of the statutes suggesting area restraints and the legislative history expresses affirmatively a purpose only to impose entry and exit control as to spies and persons fleeing or violating the law—that is to impose regulation as to *travelers*, not as to *destinations*.

The Senate debates on the enactment of the original parent act, the Act of May 22, 1918, declare its "chief object" was to scrutinize and impose control upon "aliens and alien enemies and renegade citizens" engaging

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[5]The only legislative history as to Section 1185 itself is the simple statement in the House Report respecting it stating its provisions "are incorporated in the bill in practically the same form as they now appear in the Act of May 22, 1918 [as amended by the Act of June 21, 1941]." (H. Rep. 1365, 82nd Cong., 2d Sess., p. 53.)

in or subserving espionage and who "can now enter and depart without any power . . . to intercept or delay them." (56 Cong. Rec. 6192; see also p. 6029.) In like manner, the House debates on the enactment of the Act of June 21, 1941 declare its "sole purpose" was to impose "a sort of clearing house" over persons entering and leaving the country to ascertain "their reasons why they were going or coming . . . and whether they were engaged in espionage [or law violations]." (87 Cong. Rec. 5052.)

Over and over again in the debates as to both the 1918 and 1941 Acts there is reiterated the purpose of *border control*—to seal and control the points of entry and exit against espionage agents and law violators by requiring passports for passage and identification.[6] *Never* as to either Act is there suggestion of intent to impose or authorize *area* prohibitions or restrictions.[7]

(2) Moreover, the limiting import of the foregoing legislative history indicating that Section 1185 and its predecessors were not intended to authorize criminal area travel restrictions is corroborated by the record of area restrictions and of Executive acts and declarations relating thereto undertaken both before and since enactment of Section 1185. That record shows that area re-

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[6]Thus as to the 1918 Act see: 56 Cong. Rec. 5970, 6029-6031, 6066-6067, 6191-6192; see also H. Rep. No. 485, 65th Cong. 2d Sess. at pp. 2, 3; S. Rep. No. 431, 65th Cong. 2d Sess., *passim;* see also the President's Message to Congress of December 4, 1917, 56 Cong. Rec. 18, 20.

As to the 1941 Act see; 87 Cong. Rec. 5325-5326, 5386, 5048-5053, 5386-5388; S. Rep. No. 444, 77 Cong. 1st Sess., at pp. 1, 2.

[7]As to the 1918 Act see: 56 Cong. Rec. 5969-6068, 6191-6195, 6235, 6246-6248; H. Rep. No. 485, 65 Cong. 2d Sess., *supra*; S. Rep. No. 431, 65th Cong. 2d Sess., *supra*.

As to the 1941 Act see: 87 Cong. Rec. 5047-5053, 5325-5326, 5385-5389; S. Rep. No. 444, 77th Cong. 1st Sess., *supra*.

strictions where undertaken were always and unvaryingly undertaken as *civil* safe-passage-withdrawal acts only, never as criminal travel prohibitions, and Section 1185 and its predecessors were never referred to or invoked as even relevant thereto. It was not conceived that Section 1185 or either of its predecessors authorized issuance thereunder of criminal-sanction area restraints.

(a) Prior to enactment of Section 1185 (June 27, 1952) the Secretary of State on a dozen occasions beginning as early as 1914 proclaimed area restrictions as to passport rights because of war or diplomatic considerations [1914, restrictions as to Europe (Hearings, 85th Cong.[8] 63-64); 1915, restriction as to Belgium (3 Hackworth[9] 526); 1919, restriction as to Germany (*id.*, p. 530); 1935, restriction as to Ethiopia (*id.*, pp. 531-532); 1936, restriction as to Spain (*id*, pp. 533-534); 1937, restriction as to China (*id.* pp. 532-533); 1939, restriction as to Europe (*id.* pp. 534-535; 4 Fed. Reg. 3892); 1949, restriction as to Hungary (22 Dept. St. Bull. 399); 1951, restriction as to Czechoslovakia (24 Dept. St. Bull. 932); 1951, restriction as to Hungary (26 Dept. St. Bull. 7); 1952, restriction as to Eastern European Countries, China and the Soviet Union (26 Dept. St. Bull. 736)]. Of these restrictions five (the third, and the last four) were proclaimed during periods of the full operative effect of the two statutory predecessors of Section 1185, the Acts of May 22, 1918 and June 21, 1941 (*i.e.* in the periods 1918-1921

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[8]Hearings before the Committee on Foreign Relations on Department of State Passport Policies, United States Senate, 85th Cong., 1st Sess., hereinafter cited as Hearings, 85th Cong.

[9]Hackworth, Digest of International Law (1942), hereafter referred to as Hackworth.

and 1941-1952).[10] Yet *all* of the restrictions *unfailingly* were conceived and expressed *solely* in *diplomatic, safe-passage terms*. In not *one* of them—even during periods of the full operative effect of the predecessor statutes of Section 1185—is there even a *suggestion* that the restrictions imposed were or could be issued under or be given criminal sanction by the predecessor statutes of Section 1185.

In some of the examples, moreover, the civil, safe-passage nature of the restrictions is made particularly explicit. In the 1919 restriction against travel to Germany, for example, despite announcing it was "no longer issuing or authorizing . . . passports for Germany", the State Department nonetheless stated as to travelers disregarding its ban merely that such persons would "go upon their own responsibility and at their own risk. They cannot be guaranteed the same protection which they might expect under normal conditions." (3 Hackworth 530.) Although the 1918 Act predecessor to Section 1185 was then in full force and effect no slightest reference to it was made.

The most revealing of all of the area restrictions preceding the enactment of Section 1185 is the 1952 proclamation relating to travel to East European countries, China and the Soviet Union. There the State Department announced it would thenceforth "stamp all passports not valid" for travel to such countries "unless specif-

[10]The 1918 Act was in effect by Presidential proclamation only between August 8, 1918 and March 3, 1921. (40 Stat. 1829 and 41 Stat. 1359.) The 1941 Act was in effect by successive Presidential proclamations and Congressional extensions from November 1941 (55 Stat. 1696) to April 1, 1953 (66 Stat. 54, 57, 96, 137, 330, 333) by which date Section 1185 was already in effect by Presidential Proclamation 3004, January 17, 1953 (67 Stat. C31).

ically endorsed . . . for such travel." *However,* the Department's official Press Release establishing the restriction was explicit also in stating, "In making this announcement, the Department *emphasized* that *this procedure in no way forbids American travel to those areas.*" (26 Dept. St. Bull. 736, emphasis added.) The Press Release stated the Department's action represented only a "taking [of] additional steps to warn American citizens of the risks of travel in Iron Curtain countries . . ." (*Id.*).

(b) The uniform recognition by the State Department during the long historical period preceding enactment of Section 1185 that the area restrictions issued by it concerned only the diplomatic, safe-passage side of the passport powers and did not relate to criminal exit-control under the predecessor statutes to Section 1185, has continued and even been underscored since enactment of Section 1185 to and until the very recent present.

Since enactment of Section 1185 (June 27, 1952) and prior to the "Excluding Cuba" regulation at bar, the State Department proclaimed area travel restrictions on three new occasions [1955, restriction as to Albania, Bulgaria, China, North Korea and North Viet Nam (33 Dept. St. Bull. 777); 1956, restriction as to Hungary (34 Dept. St. Bull. 247-248); 1956, restriction as to Egypt, Israel, Jordan and Syria (35 Dept. St. Bull. 756)]. Again, despite the full operative effect at all times of Section 1185 these proclamations unvaryingly sounded in diplomatic, safe-passage terms only; never was there even a suggestion that the restrictions were or could be issued under or be given criminal exit-control sanction by Section 1185.

Thus, in illustration, the 1956 restriction as to travel to Hungary stated merely that the Department "is unwilling" "either to encourage or facilitate the travel of American citizens to Hungary", and that passports would not be valid for travel thereto unless specially validated. No mention of Section 1185 or of its sanctions is made, despite its full operative effectiveness at the time. (34 Dept. St. Bull. 247, 248.)

In 1957 the Senate Foreign Relations Committee, noting the Department had stated (as excerpted above) that its area restrictions "in no way forbi[d]" travel to affected countries and that despite area restrictions many persons had travelled in disregard thereof without any enforcement of any sort being attempted, asked the Department *directly* whether the stamping of a passport "not valid for travel to country X" means the United States *"withdraws its protection"* from such travel, or means the United States *"prohibits* the person from going to country X?" (Hearings, 85th Cong., *supra,* p. 59, emphasis added.) The Department replied that such restrictive stamping of a passport "means that if the bearer enters country X he *cannot be assured of the protection* of the United States . . . [but it] *does not necessarily mean that if the bearer travels to country X he will be violating the criminal law."* (*Id.,* emphasis added.) The Department said there were criminal laws "which might well be violated *in the course* of such travel", mentioning "e.g. the Trading with the Enemy Act," but the mere travel to the named country *in se* would be no crime. *No mention or citation was made of Section 1185 as even relevant to the issues posed.*

Surely had the Department truly conceived that Section 1185 applied to make penal a mere leaving of the United States to go to "country X", *it would have said so.* In the premises its silence is eloquent testimony that in truth it viewed its area restrictions as civil, safe-passage measures only, not as criminal-sanction measures of exit control.

Finally, repeated recent endeavors by the Executive to obtain from Congress an explicit statutory base to attach criminal penalties to area travel restrictions, and Congress' consistent rejection of all such endeavors, corroborates further that Section 1185 does not now provide such a base and Congress is as yet unwilling to enact one. Thus in 1957 an authoritative report of the Commission on Government Security, issued pursuant to Public Law 304, 84th Congress, 1st Sess., 69 Stat. 595, as amended, expressly recommended the amendment of Section 1185 "to make it unlawful for any citizen of the United States to travel to any country in which his passport is declared to be invalid." (Report, p. 475.) In 1958, responsive to the foregoing and to this Court's restrictive decision in *Kent v. Dulles, supra,* 357 U.S. 116, President Eisenhower recommended passage by Congress of legislation to provide, among other things, for "clear statutory authority to prevent Americans from using passports to travel to areas where there is no means of protecting them, or where their presence would conflict with our foreign policy objectives or be inimical to the security of the United States." (July 7, 1958, 104 Cong. Rec. 13062, House Document No. 417; 3 U.S. Code Cong. and Admin. News, 85th Cong. 2d Sess., at p. 5465.) The President's request was embodied in a proposed bill, introduced in the 85th Con-

grees, 1st Session as S 4110, which was thereafter followed by numerous similar bills in that and successive Congresses.[11] To date Congress has consistently failed to adopt these proposals.

All of the foregoing legislative and administrative history combines to establish four decisive things as to Section 1185. First, the history shows that Section 1185 was adopted by Congress on representations that it was to serve limited (border control) purposes only and without suggestion of authorization for criminal-sanction area restrictions. Second, the history show that the Department has uniformly cast area restrictions as *civil* acts only, and has consistently construed Section 1185 and its predecessors as inapplicable and irrelevant thereto. Third, the history reveals two express declarations by the Department—one to the people and one directly to an agency of the Congress—officially advising that area restrictions do not "forbid" free travel and are not criminal in character. Finally, the history is climaxed and completed by repeated requests by the Department of Congress that it enact a law to make violations of area restrictions crimes—requests which Congress has in all cases declined. All of this establishes a *compelling* record of administrative construction, with congressional acquiescence, that Section 1185 does not authorize issuance under its authority of criminal-sanction administrative area travel prohibitions.

The Court below did not consider or respond to any of the foregoing considerations of legislative and adminis-

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[11]See *e.g.* 85th Congress, 1st Sess.,: S. 2770, H.R. 8655; 85th Cong., 2d Sess.,: S. 3344, 4030, 4110, H.R. 13005, 13318; 86th Cong., 1st Sess.,: S. 1303, 2095, 2287, H.R. 2468, 5455, 7315, 8329, 8930, 9069; 87 Cong., 1st Sess.,: H.R. 388, 935, 973, 1086, 2485; 88th Cong. 1st Sess.: H.R. 2559, 8652.

trative history respecting Section 1185 and its inapplicability to lend criminal sanction to area travel restrictions. The decision below contented itself with observing that: "Area restrictions have long been used and are recognized as valid", citing merely *Zemel v. Rusk*. But *Zemel v. Rusk*, as heretofore noted, expressly forbore from determining the applicability of Section 1185 to area restrictions, and the history tendered here was not examined or evaluated there.

II.

To Enforce the "Excluding Cuba" Regulation Under Section 1185 With Criminal Sanctions in the Premises at Bar Would Violate Due Process for Vagueness, Contradiction and Misleading Terms in the Communication of a Criminal Command.

Enforcement of the "Excluding Cuba" regulation as a *criminal* prohibition under Section 1185 in the premises at bar would offend due process fundamentals against vagueness, contradiction and misleading terms in the communication of a criminal command.

In light of the matters set forth in Point I above, consider the position of the citizen. He looks first to the terms and legislative history of Section 1185; he finds there no intent to authorize area restrictions but only an intent to impose *border control*—to regulate *travelers*, not *destinations*.

He turns then to history and to precedent. Here he finds that all previously issued area travel restrictions have sounded only in *civil* terms, that is in terms of safe-passage withdrawal, never in terms of criminal prohibition. Not once, he finds, has there been even a

suggestion that any of the prior restrictions were or could have been issued with criminal exit-control sanctions under Section 1185 or either of its predecessor statutes.

Moreover, here he finds also affirmative, authoritative administrative *disclaimers* of criminal sanctions. Here he finds the Department of State itself declaring that area restrictions "in no way *forbi*[*d*]" free travel in violation of their terms but constitute merely "additional steps to warn American citizens of the risks of [unsanctioned] travel," and declaring further upon official inquiry from the United States Senate that disapproved travel *in itself* constitutes *no crime* though "there are laws which might well be violated *in the course of* such travel."

All of these matters of record tell the citizen that travel to the disapproved areas is not regarded as a crime. To prosecute thereafter turns this contrived structure of administrative regulations into a trap even for the wary. To suffer criminal conviction in such premises "would be to sanction and indefensible sort of entrapment by the State—convicting a citizen for exercising a privilege which the State had clearly told him was available to him." (*Raley v. Ohio,* 360 U.S. 423, 426; *Cox v. Louisiana,* 379 U.S. 559, 571; *Johnson v. United States,* 318 U.S. 189, 197; *United States v. Cardiff,* 344 U.S. 174, 176.)

Moreover, all of the foregoing circumstances are climaxed finally by the promulgation clause of the "Ex-

cluding Cuba" regulation which *expressly* declares (as developed in Point III hereafter) that that regulation is issued "pursuant to the authority" *not* of Section 1185 but of "the authority of . . . the Act of . . . July 3, 1926, 22 U.S.C. Sec. 211a," *a statute imposing no criminal sanctions for violations of regulations issued under it.*

In all of these premises it appears difficult to deny that petitioner, or any other citizen, might reasonably read the "Excluding Cuba" regulation in the light of *all of these circumstances as communicating no criminal-sanction area travel prohibition.* Petitioner was misled. She did not reach the wrong interpretation of the regulatory maze. Rather the Government reversed its field by professing to impose no criminal sanction and after reliance thereon doing the very opposite. Due process forbids contradictory, misleading or vague criminal commands. (*Jones v. United States*, 362 U.S. 257, 262-263; *United States v. Cardiff*, 344 U.S. 174, 176.)

"Fundamental fairness" requires an accused not be held to account "for a crime he could not with reasonable certainty know he was committing"; he must not "be misled" but must be "clearly apprised" by the law of its command. (*Scull v. Virginia*, 359 U.S. 344, 353; *Johnson v. United States*, 318 U.S. 189, 197; *Quinn v. United States*, 349 U.S. 155, 166.)

Before a citizen can be convicted of a crime he must be made to *know* by Government that his act is *criminally prohibited;* without such awareness his state of

mind lacks punishable *scienter*. (*Morissette v. United States*, 342 U.S. 246; *Lambert v. California*, 355 U.S. 225; *Smith v. California*, 361 U.S. 147, 150-151.)

On the issue here concerned the Court below erroneously misread a stipulation that petitioner "knew" the contents of Section 1185 and of the "Excluding Cuba" regulation as signifying petitioner knew the intended meaning thereof claimed by the Government. There was no stipulation as to *meaning* at all, only a stipulation of knowledge as to *terms*. The Court below stated,

> "A reading of the statute and the regulations demonstrates the plain and unambiguous meaning to be that a person is subject to criminal penalties on leaving the United States for Cuba without a valid passport. That Appellant knew *this* is agreed in the stipulation." [R. 142, emphasis added.]

The true stipulation was only that petitioner "knew the provisions of Section 1185(b) of Title 8, United States Code, and Sections 53.2 and 53.3 of Title 22, Code of Federal Regulations." [R. 65, lines 24-26.] This does not at all stipulate to the meaning or effect of the statute or regulation as claimed by the Government, and the erroneous conclusion to the contrary by the Court below leaves unconsidered below[11a] petitioner's *serious* claim here that the statute and regulation violate due process because of vagueness, contradiction and misleading terms in the communication of a criminal command.

[11a] This oversight, indeed, was pointed out to the Court below in the Petition for Rehearing filed below, but rehearing was denied without comment.

III.

The "Excluding Cuba" Regulation Was Not Promulgated Under Section 1185.

Even if it be assumed that Section 1185 authorizes issuance of criminal area restrictions under its authority, violation of the "Excluding Cuba" regulation can be no crime because that regulation was promulgated *expressly* under the authority *only* of 22 U.S.C. Sec. 211a, Act of July 3, 1926, *not* under Section 1185.

The penalty-imposing portion of Section 1185 provides punishment only for "Any person who shall willfully violate any of the provisions of this section, or . . . of any . . . regulation issued therunder . . ." (8 U.S.C. Sec. 1185(c).) Contrasted with Section 1185, 22 U.S.C. Sec. 211a, Act of July 3, 1926 (44 Stat. 887), provides no criminal penalty for violation of regulations issued under it.

The promulgative paragraph of the "Excluding Cuba" regulation (Regulation No. 108.456, 26 Fed. Reg. 482), excerpted for clarity, invokes *expressly* the authority of the *Act of July 3, 1926, not of Section 1185,* stating:

> "Pursuant to the authority vested in me by . . . the Act [of] July 3, 1926 . . . I hereby amend paragraph (b) [of 22 C. F. R. 53.3] as follows . . ." (26 Fed. Reg. 482.)[12]

[12]Following the body of the Amendment in its official version in 26 Fed. Reg. 482 Section 1185 does appear in lesser type and in parenthesis but that Section is *not* referred to in the promulgating clause.

Public Notice 179 issued concurrently with Regulation No. 108.456 and to apprise the public thereof is to like effect. It states:

> "Therefore pursuant to the authority vested in me by [22 C. F. R. 51.75 and 51.77] issued . . . under authority of . . . the Act [of] July 3, 1926 . . . all United States passports are hereby declared to be invalid . . ." (26 Fed. Reg. 492.)

Thus, even could it have been, the "Excluding Cuba" regulation was *not* issued or promulgated under Section 1185, but only under the Act of July 3, 1926, 22 U.S.C. Sec. 211a, a statute providing no criminal penalty for violations of regulations issued under it. Hence criminal enforcement cannot lie at bar. It is plain that criminal prosecution for violation of an administrative regulation can only be had where the regulation is issued under a statute providing for criminal punishment for violations of regulations issued under it.

On the issue here concerned the Court below observed only, "The 'Excluding Cuba' regulation is an *amendment* and as originally promulgated *22 C.F.R. 53.1-53.9 made specific reference to 8 U.S.C. Sec. 1185.*" (Emphasis added.) The circumstance, however, that the *original* regulations of 22 C.F.R. 53.1-53.9 *were* issued and promulgated under the authority and with the criminal sanction of Section 1185[18] does not reach, affect or cure the circumstance that the "Excluding Cuba" amendment *was not issued under such authority* but only under

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[18]Actually they were issued under the predecessor statutes of Section 1185, the Act of May 22, 1918, 40 Stat. 559, as amended by the Act of June 21, 1941, 55 Stat. 252, as was expressly recited in their promulgation clause, 6 Fed. Reg. 6069. They were adopted under Section 1185 by incorporation by reference in Presidential Proclamation No. 3004, January 17, 1953, 67 Stat. C31, par. 1.

authority of Section 211a, carrying *no power of criminal sanction.*

The issue is important and narrow and is a question of *authorizing power*. The authority of administrative officers to enact regulations with the force of criminal sanctions must be grounded in an *authorizing statute;* it is an awesome power and is strictly circumscribed. Accordingly, even to amend originally criminal regulations so that the amendment or change will also bear criminal force, the amendment must itself be duly issued under the authorization and authority of a statute providing criminal penalty for violation of regulations issued under it. Section 211a, under the authority of which *alone* the "Excluding Cuba" regulation was expressly issued, possesses and transmits no such authorizing power. Hence violation of that regulation can be no crime.

IV.

Construed to Authorize the "Excluding Cuba" Regulation at Bar, Section 1185 Unconstitutionally Delegates Legislative Power Without Adequate or Any Standards.

In *Zemel v. Rusk,* 381 U.S. 1, this Court upheld issuance of area travel restrictions under the *civil* authorizing statute 22 U.S.C. Sec. 211a (Act of July 3, 1926, 44 Stat. 887), holding that statute in authorizing such restrictions did not unconstitutionally delegate legislative power (although it embodied no statutory standards) because sufficient standards could be apprehended in prior administrative practice. The Court ruled that "the 1926 Act must take its content from history: it authorizes only those passport refusals and restrictions 'which it could fairly be argued were adopted by Con-

gress in light of prior administrative practice.' . . . So limited, the Act does not constitute an invalid delegation." (381 U.S. 1, 17-18.)

At bar Section 1185 establishes *no* standards for issuance under *it* of area regulations and there can be no saving of the statute by recourse to prior administrative practice. This because, as heretofore seen, all administrative practice prior to enactment of Section 1185 in 1952 unites to demonstrate no area restrictions were ever attempted to be issued under the criminal sanctions of either of the predecessor statutes to Section 1185. All prior area restrictions were issued under the civil, safe-passage passport powers only and their issuance, in the Department's words, did not "forbid" free travel despite the restrictions.

Thus the prior practice proves not the prior reasonable exertion of criminal area-restriction powers but a *denial* and *disclaimer* thereof. Such a *negating* record clearly can afford no administrative base for supplying affirmative discretionary standards capable of adoption by Congress in the enactment of Section 1185.

V.

Construed to Authorize the "Excluding Cuba" Regulation at Bar, Section 1185 Deprives Petitioner of Personal Liberty and of Freedom of Speech, Thought and Association Contrary to the First and Fifth Amendments.

The liberty of individual citizens to travel freely to all parts of our world is, in this Court's words, "a part of our heritage"; it is "basic in our scheme of values." (*Kent v. Dulles*, 357 U.S. 116, 126.) It is, moreover, "a constitutional liberty closely related to the rights of

free speech and association" (*Aptheker v. Secretary of State*, 378 U.S. 500, 517), and its free exercise "'enables American citizens . . . to be well-informed on public issues,'" thereby "'contribut[ing] to sounder [democratic] decisions.'" (*Kent v. Dulles, supra*, 357 U.S. at pp. 126-127.)

It is true this Court in *Zemel v. Rusk, supra*, 381 U.S. 1, ruled the Department of State has Constitutional power to refuse to issue a passport valid for travel to Cuba under the *civil* safe-passage side of the passport powers. But involved at bar is a criminal prohibition, not a civil withdrawal of a protective privilege.

It is one thing to say that Government may determine to withdraw from specified parts of the world for reasons of foreign and diplomatic policy the privilege of the diplomatic safe-passage protection afforded by passports, and may require citizens if they travel to such areas to proceed on their individual responsibility only. It is another thing entirely to say that Government may outright prohibit *any* free travel to administratively-listed areas of the globe on pain of criminal punishment even as to citizens willing to travel without diplomatic passport protection. It is the latter which is involved here. That issue was expressly reserved in *Zemel v. Rusk*, and this Court should now affirm that under the Bill of Rights the Government may not thus prohibit and punish free travel.

Moreover, there is one feature of the "Excluding Cuba" regulation at bar *particularly* offensive to personal liberty and to freedom of speech, thought and association. Concurrent with the "Excluding Cuba"

regulation the Department of State issued Press Release No. 24 (44 Dept. St. Bull. 178) announcing that under the regulation *discretionary* validation of passports for travel to Cuba would be allowable—but *only* to "persons whose travel may be regarded as being in the best interests of the United States . . ."

This vests the Secretary with "completely uncontrolled discretion" to allow or disallow passports for Cuban travel at his license, enabling him in this area of sensitive, First-Amendment connected rights and liberties "to act as a censor," jeopardizing "the right of a person or group not to be denied equal protection of the laws." (*Cox v. Louisiana,* 379 U.S. 536, 555-557.) "It is clearly unconstitutional to enable a public official . . . to engage in invidious discrimination among persons or groups . . . by use of a statute providing a system of broad discretionary licensing power" over First Amendment area rights. (*Id.* at p. 557; *Thornhill v. Alabama,* 310 U.S. 88, 97; *Kunz v. New York,* 340 U.S. 290, 294; *Saia v. New York,* 334 U.S. 558, 560-561; *Niemotko v. Maryland,* 340 U.S. 268, 271-272; *Cantwell v. Connecticut,* 310 U.S. 296, 305-307; *Largent v. Texas,* 318 U.S. 418, 422.)

A statute creating such arbitrary, censorial licensing power over freedom of speech, thought and association and related liberties is void upon its face and may be attacked by any citizen "whether or not he applied for a license." (*Freedman v. Maryland,* 380 U.S. 50, 56; *Staub v. City of Baxley,* 355 U.S. 313, 319; *Thornhill v. Alabama, supra,* 310 U.S. 88, 97.)

VI.

Petitioner Departed Not for Cuba but for Mexico, and Without Even Prior Request for Permission to Enter Cuba; Properly Construed and Constitutionally Limited, Section 1185 Does Not Reach Such a Departure.

When petitioner departed the United States on the dates charged in the indictment she went to Mexico, not to Cuba. Only *after* her United States departure, and *after* her arrival in Mexico in each instance, did she apply for and ultimately secure Cuban permission to enter Cuba. Accordingly, at the time of each of her "departures" from the United States she had no *ability* to, and she did not, "depart" without a passport from the United States *for* Cuba "a place outside the United States for which a valid passport is required" [Indictment; R. 2] within the meaning of Section 1185.

Section 1185 covers only *departure;* it operates only on the facts existing at the moment of such departure. Properly construed and Constitutionally limited, it cannot apply to the facts at bar. To say that departure can be rendered penal by a *subsequent* seeking and obtaining of permission to enter Cuba is to defy reason and to make the statute arbitrary and void in its application under due process fundamentals.

This may be illustrated by asking what would happen under the statute as the Government construes it if petitioner on arrival in Mexico and on requesting Cuban entry permission had been refused such permission, or, in Mexico, had requested and obtained permission to enter Cuba but because of other circum-

stances did not in fact travel there. By the Government's thesis the offense would nonetheless be complete because complete at the moment of departing, regardless of whether travel to Cuba should actually eventuate or not.

The Government's interpretation is unreasonable and arbitrary. The statute should be limited and construed not to apply to departures as at bar where at the time of departure there does not exist *ability* to enter (by existing permission) the country travel to which requires a passport not possessed.

VII.

No Sufficient Presidential Proclamation of Emergency Exists to Support the "Excluding Cuba" Regulation Under Section 1185 at Bar.

Section 1185 by its terms applies during peace time only "during the existence of any national emergency proclaimed by the President" and then only if the President finds and further proclaims "that the interests of the United States require" the imposition of additional entry and departure restrictions.

Presidential Proclamations Nos. 3004 and 2914 at bar do not supply a proper base under the foregoing requirements for enforcement of the "Excluding Cuba" regulation under Section 1185.

Firstly, Proclamation No. 3004 makes no proclamation of apprehended need for *geographical* area travel restrictions. Section 1185 is a criminal statute and must be narrowly construed, and its condition that departure restrictions must be found to be "require[d]" by "the interests of the United States" must be liberally en-

forced in favor of the accused, so as to require for area departure restrictions a finding of specific need for the particular restriction.

Secondly, both Proclamations Nos. 2914 and 3004 (issued December 16, 1950 and January 17, 1953, respectively) are bottomed on the existing emergency at the time of their proclamation of the Korean War; that foundational premise of both proclamations ceased with the end of that "war" emergency on July 27, 1953.

This Court is not bound by a decade-old declaration of a national emergency which is inapplicable to the present situation and no longer truly endures. It has the authority to inquire as to whether there is in fact such a national emergency in existence today which can support the restriction upon liberty of travel represented by the "Excluding Cuba" regulation. (*Chastleton Corp. v. Sinclair,* 264 U.S. 543, 547-548; *East New York Savings Bank v. Hahn,* 326 U.S. 230, 234-235; *Woods v. Miller,* 333 U.S. 138, 147, Mr. Justice Jackson concurring.)

Conclusion.

Wherefore, the Petition for Writ of Certiorari to the Court of Appeals for the Ninth Circuit should be granted.

Respectfully submitted,

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APPENDIX A.

Opinion of the District Court.

Memorandum Opinion on Finding Defendant Guilty as Charged.

United States District Court, Southern District of California, Central Division.

United States of America, Plaintiff, vs. Helen Maxine Levi Travis, Defendant. No. 32380-CD.

Defendant is indicted on two counts for violation of 8 U.S.C. § 1185(b). The violations consist of defendant knowingly and willfully departing from the United States for Cuba on January 22, 1962, and August 18, 1962, without a valid passport for such travel. It is agreed that on each departure defendant intended to go to Cuba and did go to Cuba. Each of defendant's trips to Cuba was accomplished by going to Mexico City with the intent to obtain authority of Cuban representatives in Mexico to visit Cuba. On each occasion this authority was obtained and, as noted above, Cuba was visited. Defendant urges that although she left the United States with the intent to go to Cuba, her entry into Cuba was dependent on receiving Cuba's permission after arriving in Mexico City and that to violate the statute here involved her departure from the United States must have been for a country which was ready to receive her. The case of *Heikkinen vs. U.S.*, 355 U.S. 273 at 276, and other authorities cited by defendant, do not appear to support this defense.

Section 1185(b) provides in pertinent part:

> "* * * it shall * * * be unlawful for any citizen of the United States to depart from or enter, or attempt to depart from or enter, the United States unless he bears a valid passport."

If there is a legal basis for the restriction of travel by the promulgation of 22 C.F.R. 53.3, which excludes Cuba from the list of countries to which a citizen may travel without a passport specifically endorsed for such travel, then the court concludes defendant is guilty of the offenses charged. Defendant argues there is no legal basis for the restriction on travel here involved and no legal basis for making a violation of the restriction a criminal offense. Defendant, by way of argument [pg. 3-10 of her Memo in support of motion for judgment of acquittal], urges that the regulation last above mentioned was not promulgated under 8 U.S.C. 1185(b), which makes violation a crime [1185(c)], but actually under Executive Order 7856 and 22 U.S.C. 221(a) and 5 U.S.C. 151(c) which makes no provision for violation thereof to be a crime. This position of defendant is not supported by the opinion of the District Court in *MacEwan vs. Dean Rusk,* [D.C.E.D. Pa. Civil Action No. 33038, decided March 30, 1964] wherein Judge Freedman states at pages 8 and 9 of his opinion:

> "The Secretary of State does not rely solely on inherent executive power. He claims statutory authority for the regulations he has promulgated. There are two Acts of Congress to which the Secretary points as the sources of his power. One is §215 of the Immigration and Nationality Act of 1952, 8 U.S.C. §1185. The other is the Passport Act of 1926, §1, 22 U.S.C. §211(a)."

Following this statement, the court, at pages 12-14, outlines the history and contents of the pertinent Presidential proclamations (beginning with President Truman's proclamation No. 2914 on December 16, 1950), regulations prescribed by the Secretary of State and amend-

ments thereto and Public Notice No. 179, referred to by defendant herein.

The MacEwan case, supra, involved an action by plaintiffs therein for declaratory judgment which would declare invalid regulations issued by the Secretary of State (22 C.F.R. 53.3) pursuant to which they were refused endorsement on their passports for travel to Cuba. Both sides moved for summary judgment. Plaintiffs' motion was denied and the defendants' motion granted. In *Zemel vs. Dean Rusk,* et al., [D.C. Conn. Civil Action No. 9549, decided February 20, 1964] Judge Clarie, of a three-judge court, writing the majority opinion, observes at page 9:

> "It is this Court's finding that Congress has granted adequate authority to the Executive Department to make these regulations, that their application in this instance does not violate due process and the statutes which authorize the regulations, 22 U.S.C.A. § 211(a) and 8 U.S.C.A. § 1185 are valid and constitutional."

and at page 12:

> "In this case the authority of the Secretary of State is founded on two specific acts of the Congress, namely, the Passport Act of 1926, 44 Stat. 887, 22 U.S.C. §221(a) and § 215 of the Immigration and Nationality Act of 1952, 66 Stat. 163, 190, 8 U.S.C. § 1185."

The Zemel case involved an action by plaintiff "* * * for a declaratory judgment and to enjoin the enforcement and execution of two acts of Congress, namely, the Passport Act of 1926, 44 Stat. 887, 22 U.S.C. § 211(a) and § 215 of the Immigration and

Nationality Act of 1952, 66 Stat. 163, 190, 8 U.S.C. §1185, both of which the plaintiff claims are repugnant to the Constitution." Both plaintiff and defendants moved for summary judgment. Plaintiff's motion was denied and defendants' motion was granted. Two of the judges of the three-judge court sitting on the case filed opinions concurring in part and dissenting in part from the majority opinion of Judge Clarie. Judge Smith disagreed with the view that the area restrictions are authorized and Judge Blumenfeld, although agreeing with Judge Clarie that the area restrictions are a reasonable regulation of travel, did not think the plaintiff was entitled to a construction of 8 U.S.C. 1185 before it is raised in a criminal proceeding.

This court concludes, after considering all of the arguments and examination of documents submitted by the parties, that Title 22 C.F.R. 53.1-9 was promulgated under the authority of 8 U.S.C. 1185 and that the amending regulation (1961) was also promulgated under said section and Presidential Executive Order No. 3004 which was issued under that statute. In Executive Order No. 3004, President Truman clearly found as provided therein "* * * that the interests of the United States require the restrictions and prohibitions, * * *." Said Executive Order adopted and incorporated therein 22 C.F.R. 53.1-9 and authorized the Secretary of State to "revoke, modify or amend such regulations as he may find the interests of the United States to require." Such delegation of authority is authorized by 3 U.S.C. § 301 and 302. See also 8 U.S.C. 1185(b).

Defendant urges that the restrictions on travel here involved find no basis in the inherent power of the Executive, that the issue here turns on government control

over travel in relationship between this Government and its own citizens as distinguished from control as an instrument of foreign policy in the relations of this country with other countries. This point was considered by this court on defendant's motion to dismiss and the court adheres to its conclusion at that time, that the conduct of foreign affairs would include the authority to limit travel to certain areas of the world by citizens of the country without valid passports.

The other points made by defendant in support of her motion for acquittal are that:

(a) Congress, in enacting 8 U.S.C. 1185(b), did not authorize the Executive to impose the limitations here involved,

(b) Such construction of the statute delegates legislative power contrary to Article I, Section 8, of the Constitution of the United States, and

(c) Such construction deprives defendant of her right to travel contrary to the First and Fifth Amendments of the Constitution of the United States.

As to (a) above, the court is of the opinion that the provisions of Section 1185 are sufficient to impose the penalty therein provided for violation of the limitation of travel to Cuba as set forth above. New legislation is not believed to be required. See MacEwan, supra, page 12. Points (b) and (c) above were argued by defendant in her motion to dismiss and considered by the court in its Memorandum Opinion filed October 30, 1963, on denying the motion to dismiss and that opinion is hereby adopted and made a part hereof by reference. It is to be noted that following the motion to dismiss in the instant action, further proceedings were delayed pending the

rulings of the courts in the MacEwan and Zemel cases, supra. The opinions in those cases, which have not as yet been reported, discuss and rule on most of the points urged by defendant in the case at bar and this court cites those civil actions in support of its conclusions herein.

Defendant depends in substantial part, in support of her position in the instant case, on the opinion of the Supreme Court of the United States in *Kent vs. Dulles*, 357 U.S. 116 (1958). The Supreme Court in the Dulles case was concerned with the delegation to the Secretary of State of authority to withhold passports to citizens because of their beliefs and associations. In the opinion of this court, the Kent case is clearly to be distinguished from the situation in the case at bar, as pointed out and discussed in the court's opinion re denying defendant's motion to dismiss, mentioned hereinabove, and that discussion will not be repeated at this time. For additional discussion of Kent vs. Dulles, supra, see also the MacEwan case, supra, pages 3-6, 17-19 and 23, and the Zemel case, supra, at pages 19-22, and cases there cited.

In the recent case of *Worthy vs. United States*, 328 F. 2d 386 (1st Cir. Feb. 20, 1964), the court was concerned with criminal liability on the part of the appellant, Worthy, who had *entered* the United States without a valid passport after visiting Cuba. In reversing the District Court, which held that Worthy had unlawfully entered the United States without a passport in the circumstances, the Court of Appeals observed that an unlawful entry does not include an unlawful departure. At page 393 of its opinion, the court states:

"If the conviction of the appellant had been for a willful *departure* from the United States without

a valid passport we would be confronted with a less difficult problem. A citizen, at an airport or pier, without a passport, can refrain from a violation of the statute by remaining in the country. So doing, the citizen can continue to exercise all of the rights and privileges of citizenship and enjoy the protection afforded to him by constitutions and laws incident to his citizenship." (Emphasis added.)

Also:

"Since Congress has the power to declare a policy with respect to foreign affairs, and to impose reasonable restrictions on the right of the citizen to travel in foreign countries, it follows that it may punish violations of the statute. See Hyde v. Shine, 199 U.S. 62, 25 S. Ct. 760, 50 L. Ed. 90."

Defendant is so insistent that her departure from the United States with intent to go to Cuba (by way of Mexico City) without a valid passport for Cuba does not violate the statute and regulation involved, that further brief comment on the point appears to be in order. It appears obvious that the intent of Congress was to allow the President, through the Secretary of State, to preclude travel to excluded areas or countries in circumstances such as are here involved. In the opinion of the court, "departure from the United States for Cuba" is tantamount to leaving the United States with the intent to go to Cuba which, it is agreed, the defendant did, and without a valid passport. If the effect of the statute and regulation can be circumvented by a citizen going to another country and there obtaining authority to travel to the excluded country then the in-

tent of Congress would be entirely obviated and the statute and regulation nullified.

The court concludes, after consideration of the stipulation as to facts, the oral argument of counsel and the memoranda of points and authorities filed, that defendant's motion for acquittal should be and is hereby denied, and the court finds the defendant guilty as charged on each of the counts in the Indictment.

Dated: May 13, 1964.

E. Avery Crary
E. Avery Crary
United States District Judge

APPENDIX B.

Opinion Below.

United States Court of Appeals for the Ninth Circuit.

Helen Maxine Levi Travis, Appellant, vs. United States of America, Appellee. No. 19,628.

[Nov. 19, 1965]

Appeal from the United States District Court for the Southern District of California, Central Division.

Before: Barnes and Koelsch, Circuit Judges; and Powell, District Judge.

Per Curiam:

This appeal is from a judgment and conviction for violation of 8 U.S.C. §1185(b) and the regulations thereunder, Sections 53.1 through 53.9, Title 22, Code of Federal Regulations as amended. The indictment in two counts charged that on January 22, 1962, and August 18, 1962, the appellant knowingly and willfully departed the United States for Cuba without a valid passport for such travel. A jury trial was waived and appellant was tried by the court on an agreed Stipulation of Facts.

Appellant is an American citizen. At all times pertinent and material she did not bear a valid United States passport specifically endorsed for travel to Cuba. Appellant had knowledge of the provisions of 8 U.S.C. §1185(b) and 22 CFR 53.2 and 53.3. Appellant made two trips to Cuba from the United States, both via Mexico. She obtained permission of the Cuban government to enter Cuba after her arrival in Mexico. On both

occasions of her departure from the United States it was appellant's intention to travel to Cuba.

Zemel v. Rusk, 381 U.S. 1, was decided by the Supreme Court in May, 1965, after this case had been argued. It was a civil action brought to compel the Secretary of State to issue a valid passport for travel to Cuba. The plaintiff there sought to enjoin the enforcement of the same criminal statute and regulations under which appellant here was convicted. The area restrictions on the issuance and use of passports were held constitutional and an authorized delegation of authority to the President and Secretary of State. 381 U.S. pages 7 through 13. The court declined to pass on the request to enjoin the enforcement of 8 U.S.C. §1185(b). It stated:

> "* * * We hold that on either interpretation of the complaint, the court below was correct in refusing to reach the issue of criminal liability.
>
> "* * * For if we are to avoid rendering a series of advisory opinions, adjudication of the reach and constitutionality of §215(b) must await a concrete fact situation. * * *" Zemel v. Rusk, 381 U.S. 1, at 19, 20.

Appellant attacks the statute, 8 U.S.C. §1185[1] as not authorizing area restrictions, being void as vague and

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[1] "(a) When the United States is at war or during the existence of any national emergency proclaimed by the President, or, as to aliens, whenever there exists a state of war between or among two or more states, and the President shall find that the interests of the United States require that restrictions and prohibitions in addition to those provided otherwise than by this section be imposed upon the departure of persons from and their entry into the United States, and shall make public proclamation thereof, it shall,

not being cited in the promulgation clause of the amendment to the regulations which is referred to as the "Excluding Cuba" regulation. (22 CFR 53.3).

Area restrictions have long been used and are recognized as valid. 381 U.S. pages 7 through 13. Section 1185 made it unlawful to depart for Cuba without a valid passport in violation of 22 CFR 53.1-53.9, as amended. A reading of the statute and the regulations demonstrates the plain and unambiguous meaning to be that a person is subject to criminal penalties on leaving the United States for Cuba without a valid passport. That appellant knew this is agreed in the stipulation. The "Excluding Cuba" regulation is an amendment and as originally promulgated, 22 CFR 53.1-53.9, made specific reference to 8 U.S.C. §1185. We consider the statute and regulations valid against appellant's attack. *United States v. Healy,* 376 U.S. 75, 82, N. 7; *Worthy v. Herter,* 270 F. 2d 905, 912 (D.C. Cir. 1959); *Porter v. Herter,* 278 F. 2d 280, 282 (D.C. Cir. 1960); *Worthy v. United States,* 328 F. 2d 386 (5 Cir. 1964).

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until otherwise ordered by the President or the Congress, be unlawful—

* * *

"Citizens

(b) After such proclamation as is provided for in sub-section (a) of this section has been made and published and while such proclamation is in force, it shall, except as otherwise provided by the President, and subject to such limitations and exceptions as the President may authorize and prescribe, be unlawful for any citizen of the United States to depart from or enter, or attempt to depart from or enter, the United States unless he bears a valid passport.

"Penalties

(c) Any person who shall wilfully violate any of the provisions of this section, or of any order or proclamation of the President promulgated, or of any permit, rule, or regulation issued thereunder, shall, upon conviction, be fined not more than $5,000, or, if a natural person, imprisoned for not more than five years, or both; * * *."

Appellant contends hers was not a departure for Cuba as she did not have that country's consent to enter Cuba when she left the United States. Possible fact situations, including the one here, are suggested in *Zemel v. Rusk*, 381 U.S. 1, 19. It is our opinion that appellant did depart from the United States for Cuba without a valid passport in violation of 8 U.S.C. §1185-(b). We adopt a portion of the opinion of the trial court:

> "In the opinion of the court, 'departure from the United States for Cuba' is tantamount to leaving the United States with the intent to go to Cuba, which, it is agreed, the defendant did, and without a valid passport. If the effect of the statute and regulation can be circumvented by a citizen going to another country and there obtaining authority to travel to the excluded country then the intent of Congress would be entirely obviated and the statute and regulation nullified." (T. 123)

We affirm.

APPENDIX C.

Section 1185 of Title 8 of the United States Code, enacted as Section 215 of the Immigration and Nationality Act of 1952, Act of June 27, 1952, c. 477, Title II, c. 2, 66 Stat. 190, reads in material part as follows:

Travel Control of Citizens and Aliens During War or National Emergency—Restrictions and Prohibitions on Aliens.

(a) When the United States is at war or during the existence of any national emergency proclaimed by the President, or, as to aliens, whenever there exists a state of war between or among two or more states, and the President shall find that the interests of the United States require that restrictions and prohibitions in addiion to those provided otherwise than by this section be imposed upon the departure of persons from and their entry into the United States, and shall make public proclamation thereof, it shall, until otherwise ordered by the President or the Congress, be unlawful—

* * *

Citizens

(b) After such proclamation as is provided for in subsection (a) of this section has been made and published and while such proclamation is in force, it shall, except as otherwise provided by the President, and subject to such limitations and exceptions as the President may authorize and prescribe, be unlawful for any citizen of the United States to depart from or enter, or attempt to depart from or enter, the United States unless he bears a valid passport.

Penalties

(c) Any person who shall wilfully violate any of the provisions of this section, or of any order or proclamation of the President promulgated, or of any permit, rule, or regulation issued thereunder, shall, upon conviction, be fined not more than $5,000, or, if a natural person, imprisoned for not more than five years, or both; * * *.

APPENDIX D.

The "Excluding Cuba" Regulation, January 16, 1961, Dept. Reg. No. 108.456, 26 Fed. Reg. 482 (amending 22 C. F. R. Sec. 53.3 which follows immediately as Appendix E), reads in full as follows:

Dept. Reg. 108.456.

PART 53 — TRAVEL CONTROL OF CITIZENS AND NATIONALS IN TIME OF WAR OR NATIONAL EMERGENCY

EXCEPTIONS TO REGULATIONS

Pursuant to the authority vested in me by paragraph 126 of Executive Order No. 7856, dated March 31, 1938, issued under the authority of section 1 of the act of Congress approved July 3, 1926 (44 Stat. 887, 22 U.S.C. 211a), and section 4 of the act of May 26, 1949 (63 Stat. 111; 5 U.S.C. 151c), I hereby amend paragraph (b) of 53.3, Exceptions to regulations in §53.2 of Title 22 of the Code of Federal Regulations to read as follows:

§53.3 Exceptions to Regulations in 53.2

* * *

(b) When traveling between the United States and any country, territory or island adjacent thereto in North, Central, or South America, excluding Cuba: *Provided,* That this exception shall not be applicable to any such person when traveling to or arriving from a place outside the United States for which a valid passport is required under this part, if such travel is accomplished via any country or territory in North, Central, or South America or any island adjacent thereto: *And provided also,* That this section shall not be applicable to any seaman

except as provided in paragraph (e) of this section; or

App. D. Section 215, 66 Stat. 190; 8 U.S.C. 1185 and Executive Order 3004 dated January 17, 1953, 18 F.R. 489)

The regulation contained in this order shall become effective upon publication in the FEDERAL REGISTER. The provisions of section 4 of the Administrative Procedure Act (60 Stat. 238; 5 U.S.C. 1003) relative to notice of proposed rule making and delayed effective date are inapplicable to this order because the provisions thereof involve foreign affairs functions of the United States.

Dated: January 16, 1961.

For the Secretary of State.

LOY W. HENDERSON
Deputy Under Secretary for
Administration.

(F.R. Doc. 61-506; Filed, Jan. 18, 1961; 8:54 a.m.)

* * * *

APPENDIX E.

The regulations appearing in Part 53 of Title 22 of the Code of Federal Regulations in their *unamended form* as they appeared *prior to January 16, 1961* (i.e. before promulgation of the "Excluding Cuba" Regulation reproduced in Appendix D above), read in material part as follows:

Part 53—Travel Control of Citizens and Nationals in Time of War or National Emergency.

§53.1 *Definition of the term "United States."* The term "United States" as used in this part includes the Canal Zone, and all territory and waters, continental or insular, subject to the jurisdiction of the United States.

§53.2 *Limitations upon travel.* No citizen of the United States or person who owes allegiance to the United States shall depart from or enter into or attempt to depart from or enter into any part of the United States as defined in §53.1, unless he bears a valid passport which has been issued by or under authority of the Secretary of State or unless he comes within one of the exceptions prescribed in §53.3.

§53.3 *Exceptions to regulations in §53.2.* No valid passport shall be required of a citizen of the United States or of a person who owes allegiance to the United States:

* * *

(b) When traveling between the United States and any country or territory in North, Central or South America or in any island adjacent thereto: *Provided,* That this exception shall not be applicable to any such person when traveling to or arriving from a place outside the United States for which a valid passport is required under this part, if such travel is accomplished via any country or territory in North, Central, or South America or any island adjacent thereto: *And provided also,* That this section shall not be applicable to any seaman except as provided in paragraph (c) of this section; * * *.

* * *

APPENDIX F.

Public Notice 179, January 16, 1961, 26 Fed. Reg. 492, reads in full as follows:

DEPARTMENT OF STATE

[Public Notice 179]

Restrictions on Travel to or in Cuba

In view of the conditions existing in Cuba and in the absence of diplomatic relations between that country and the United States of America I find that the unrestricted travel by United States citizens to or in Cuba would be contrary to the foreign policy of the United States and would be otherwise inimical to the national interest.

Therefore pursuant to the authority vested in me by Sections 124 and 126 of Executive Order No. 7856, issued on March 31, 1938 (3 F.R. 681, 687, 22 C.F.R. 51.75 and 51.77) under authority of Section 1 of the Act of Congress approved July 3, 1926 (44 Stat. 887, 22 U.S.C. 211a), all United States passports are hereby declared to be invalid for travel to or in Cuba except the passports of United States citizens now in Cuba. Upon departure of such citizens from Cuba their passports shall be subject to this order.

Hereafter United States passports shall not be valid for travel to or in Cuba unless specially endorsed for such travel under the authority of the Secretary of State or until this order is revoked.

Dated: January 16, 1961

For the Secretary of State.

LOY HENDERSON,

Deputy Under Secretary for Administration

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APPENDIX G.

Press Release No. 24, January 16, 1961, 44 Dept. of State Bull. 178, reads in full as follows:

PRESS RELEASE No. 24

The Department of State announced today that in view of the United States Government's inability, following the break in diplomatic relations between the United States and Cuba, to extend normal protective services to Americans visiting Cuba, United States citizens desiring to go to Cuba must until further notice obtain passports specifically endorsed by the Department of State for such travel. All outstanding passports, except those of United States citizens remaining in Cuba, are being declared invalid for travel to Cuba unless specifically endorsed for such travel.

The Department contemplates that exceptions to these regulations will be granted to persons whose travel may be regarded as being in the best interests of the United States, such as newsmen or businessmen with previously established business interests.

Permanent resident aliens cannot travel to Cuba unless special permission is obtained for this purpose through the United States Immigration and Naturalization Service.

Federal regulations are being amended to put these requirements into effect.

These actions have been taken in conformity with the Department's normal practice of limiting travel to those countries with which the United States does not maintain diplomatic relations.

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APPENDIX H.

Presidential Proclamation, No. 3004, January 17, 1953, 67 Stat. C31, reads in material part as follows:

A Proclamation

WHEREAS section 215 of the Immigration and Nationality Act, enacted June 27, 1952 (Public Law 414, 82nd Congress; 66 Stat. 163, 190), authorizes the President to impose restrictions and prohibitions in addition to those otherwise provided by that Act upon the departure of persons from, and their entry into, the United States when the United States is at war or during the existence of any national emergency proclaimed by the President or, as to aliens, whenever there exists a state of war between or among two or more states, and when the President shall find that the interests of the United States so require; and

WHEREAS the national emergency the existence of which was proclaimed on December 16, 1950, by Proclamation 2914 still exists; and

WHEREAS because of the exigencies of the international situation and of the national defense then existing Proclamation No. 2523 of November 14, 1941, imposed certain restrictions and prohibitions, in addition to those otherwise provided by law, upon the departure of persons from and their entry into the United States; and

WHEREAS the exigencies of the international situation and of the national defense still require that certain restrictions and prohibitions, in addition to those otherwise provided by law, be im-

posed upon the departure of persons from and their entry into the United States:

NOW, THEREFORE, I HARRY S. TRUMAN, President of the United States of America, acting under and by virtue of the authority vested in me by section 215 of the Immigration and Nationality Act and by section 301 of Title 3 of the United States Code, do hereby find and publicly proclaim that the interests of the United States require that restrictions and prohibitions, in addition to those otherwise provided by law, be imposed upon the departure of persons from, and their entry into, the United States; and I hereby prescribe and make the following rules, regulations, and orders with respect thereto:

1. The departure and entry of citizens and nationals of the United States from and into the United States, including the Canal Zone, and all territory and waters, continental or insular, subject to the jurisdiction of the United States, shall be subject to the regulations prescribed by the Secretary of State and published as sections 53.1 to 53.9, inclusive of title 22 of the Code of Federal Regulations. Such regulations are hereby incorporated into and made a part of this proclamation; and the Secretary of State is hereby authorized to revoke, modify, or amend such regulations as he may find the interests of the United States to require.

* * *

5. I hereby direct all departments and agencies of the Government to cooperate with the Secretary of State in the execution of his authority

under this proclamation and any subsequent proclamation, rule, regulation, or order issued in pursuance hreof; and such departments and agencies shall upon request make available to the Secretary of State for that purpose the services of their respective officials and agents. I enjoin upon all officers of the United States charged with the execution of the laws thereof the utmost diligence in preventing violations of sections 215 of the Immigration and Nationality Act and this proclamation, including the regulations of the Secretary of State incorporated herein and made a part hereof, and in bringing to trial and punishment any persons violating any provision of that section or of this proclamation.

To the extent permitted by law, this proclamation shall take effect as of December 24, 1952.

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APPENDIX I.

Presidential Proclamation No. 2914, December 16, 1950, 64 Stat. A454, reads in material part as follows:

A Proclamation

WHEREAS recent events in Korea and elsewhere constitute a grave threat to the peace of the world and imperil the efforts of this country and those of the United Nations to prevent aggression and armed conflict; and

WHEREAS world conquest by communist imperialism is the goal of the forces of aggression that have been loosed upon the world; and

WHEREAS if the goal of communist imperialism were to be achieved, the people of this country would no longer enjoy the full and rich life they have with God's help built for themselves and their children; they would no longer enjoy the blessings of the freedom of worshipping as they severally choose, the freedom of reading and listening to what they choose, the right of free speech including the right to criticize their Government, the right to engage freely in collective bargaining, the right to engage freely in their own business enterprises, and the many other freedoms and rights which are a part of our way of life; and

WHEREAS the increasing menace of the forces of communist aggression requires that the national defense of the United States be strengthened as speedily as possible:

NOW, THEREFORE, I HARRY S. TRUMAN, President of the United States of America, do proclaim the existence of a national emergency * * *.

* * *

IN WITNESS WHEREOF, I have hereunto set my hand and caused the Seal of the United States of America to be affixed.

Done at the City of Washington this 16th day of December, 10:20 a.m., in the year of our Lord nineteen hundred and fifty, and of the Independence of the United States of America the one hundred and seventy-fifth.

HARRY S. TRUMAN

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